

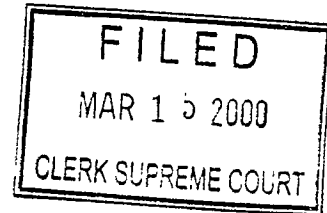
IN THE COURT OF APPEALS OF IOWA

No. 1999-337 (9-590) / 98-1570
Filed March 15, 2000

**DUANE SKOW, VINETTE SKOW,
ARNOLD LARSEN, and PAUL NOVAK,**
Plaintiffs-Appellants,

vs.

**CECIL DEAN GOFORTH and
JOYCE GOFORTH,**
Defendants-Appellees.



Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Plaintiffs appeal a district court's decision concerning the size and proper use of an easement upon the southern boundary of Cecil Goforth and Joyce Goforth's property. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

June Robbins and Robert A. Nading II of Nading Law Firm, Ankeny, for appellants.

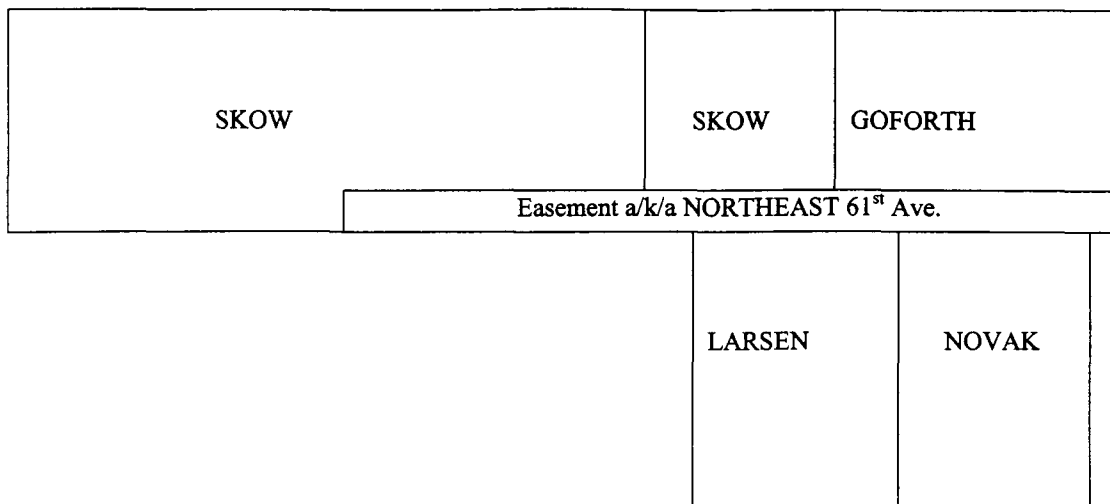
Roger J. Hudson, Sr. and Andrew B. Howie of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, P.C., Des Moines, for appellees.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

MAHAN, J.

Plaintiffs appeal a district court's decision concerning the size and proper use of an easement upon the southern boundary of Cecil Goforth and Joyce Goforth's property. Plaintiffs contend the district court erred by failing (1) to enjoin the construction of the southern fence, because the fence substantially interferes with the easement's use while providing no benefit; (2) to enjoin the harassment of persons using the easement for access to the Skows' lot, because there are alternative methods available to prohibit improper uses; and (3) to find an expansion of the express easement through prescription, implication, or acquiescence, resulting from the location of utilities and the northern fence. We affirm in part; reverse in part; and remand.

Cecil and Joyce Goforth own a four-acre property at 6110 N.E. 10th Street, formerly known as 940 N.E. 61st Avenue. Duane and Vinette Skow live immediately west of the Goforths on a two-acre property known as 828 N.E. 61st Avenue. The Skows are purchasing an additional fourteen-acre tract on contract. It is undisputed an easement consisting of a gravel road exists upon the southern border of the Goforths' four-acre property and the Skows' two-acre property providing ingress and egress from the Skows' fourteen-acre landlocked property to the only public roadway. The easement is used by the Skows and their tenants for residential access as well as the transportation of farming equipment. Arnold Larsen and Paul Novak live on the non-landlocked property immediately south of the easement. A drawing, which is not to scale, of the respective properties and easement involved in this dispute is shown below:



There is no dispute a written easement, sixteen and one-half feet wide, exists in favor of the Skow property.¹ There is a fence on the Goforth property north of the easement. This fence is approximately nineteen to twenty feet above the southern boundary of the Goforth property. In addition, there are utility poles approximately seventeen feet north of the southern boundary. The Skows have maintained the area between the easement and the northern fence with the assistance of the Goforths. This action was commenced after the Goforths indicated they intended to build a fence along the southern boundary of their property.

The plaintiffs sought a temporary and permanent injunction prohibiting the Goforths from constructing this fence. Specifically, the Goforths intended to place a fence one inch to the north of the southern boundary of their property. This fence would run from the southeast corner of the easement to the western end of the Goforth property. The fence would not be connected to anything and its purpose is questionable. A temporary injunction was granted to the Skows and the district court observed as follows:

¹ The easement was created in 1908.

Goforths have already taken a variety of positions in the case. Initially, defendants asserted that there was no easement of record. They stated that their intention was only to construct a chain link fence to keep anyone from access to the Larsen and Novak property, and that Skows' access would not be blocked—at least “not initially.” Later in the hearing defendants took the position that Skows would be allowed access for only “teams of horses”, since the written easement mentions only “teams” and not ingress or egress. Then Goforths suggested that Skows would be given access for their personal vehicles only, and that Skows' renters and heavy vehicles would not be permitted on the gravel road. Cecil Goforth testified that his primary reason for wanting the fence was to avoid the purchase of an umbrella liability policy that might cost him up to \$200 per year.

The Court concludes that there is a substantial likelihood that Skows will prevail on the merits of their claim that they have a valid and existing easement across the south one rod of the Goforth property. The Court rejects defendants' argument that such easement is limited to teams of horses. Obviously there were few motor vehicles at the time the easement was created.

The Court further concludes that it is not likely that plaintiffs Larsen or Novak will prevail on the merits. Whatever use these two plaintiffs have made of the gravel road has been merely permissive and under no claim of right. Nor is there evidence that Larsen or Novak have made improvements to the easement ground in reliance on oral or express consent to enter on the gravel road.

On March 31, 1998, the matter proceeded to trial on the Skows' request for a permanent injunction and their request to expand the easement from sixteen and one-half feet to twenty-four feet. The district court found “there is no evidence in the record to indicate the Skows' current access to their property would not be accommodated by use of the *full width* of the 16 1/2 feet.” (Emphasis added). The district court found the construction of a five-foot high chain-link fence would substantially interfere with the Skows' easement by causing snow to drift into the easement area. The district court also found the Skows' use of the easement would be substantially interfered with if the fence was placed so vehicles might not have sufficient clearance to turn onto the easement. For these reasons, the district court

enjoined the construction of the five-foot high chain-link fence. However, the district court left open the possibility the Goforths could erect a southern fence if it was consistent with the ruling and approved by the court. In ruling on the plaintiffs' 179(b) motion, the district court explained its failure to enter a permanent injunction against the Goforths as follows:

The Court finds that the past interference by Defendants Goforths with the Skows' easement was based on [Dean] Goforth's mistaken good faith belief that there was no written easement and therefore he had the discretion to control the access to the Skow property. The Court is convinced that the Goforths, now having been made aware that the written easement exists, will not interfere with the Skows' easement. The Court finds that the issuance of an injunction is not necessary.

The district court later approved the Goforths' plan to construct a three-foot high galvanized rail fence, after its previously stated concerns regarding fence placement and snow removal had been addressed.

The Skows appeal.

I. Standard of Review. This case was tried in equity and our review is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f).

II. Permanent Injunction. The Skows contend the district court erred by failing (1) to enjoin the construction of the southern fence because it substantially interferes with the use of the easement while providing no benefit to the Goforths; and (2) to enjoin the harassment, by the Goforths, of persons using the easement.

"An injunction is an extraordinary remedy which should be granted with caution and only when clearly required to avoid irreparable damage." *Planned*

Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637, 639 (Iowa 1991). An “[i]njunction is primarily a preventive remedy and looks to the future rather than to the past and is not used to punish wrongful acts already committed.” *Jenkins v. Pedersen*, 212 N.W.2d 415, 420 (Iowa 1973).

The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) substantial injury or damages will result unless the request for an injunction is granted; and (3) there is no adequate legal remedy available. *Sear v. Clayton County Zoning Bd. of Adjustment*, 590 N.W.2d 512, 515 (Iowa 1999). When considering the appropriateness of an injunction “the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief.” *Id.* (quoting *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995)).

Where a dominant landowner seeks to enjoin the servient landowner from interfering with easement rights, an injunction should be granted only in cases where an interference with, or obstruction of, the easement substantially changes or unreasonably interferes with its use. *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 812 (Iowa App. 1999). The district court addressed snow removal and placement issues as they pertain to easy ingress and egress. We conclude the placement of the fence along the southern boundary of the Goforth property would interfere with the Skows’ use of the easement. In addition, we conclude this fence would serve no useful purpose or provide any benefit. We have carefully weighed the relative hardship which would be suffered by the Goforths. We conclude they would suffer little hardship by the granting of this injunctive relief. The placement of this fence, even if only an inch into the easement, interferes with its proper use. In addition, a

three-foot galvanized fence that connects to nothing on either end serves no purpose and provides no benefit. After careful consideration, we conclude the district court erred in failing to issue a permanent injunction enjoining the construction of this fence.

The Skows are also concerned the Goforths may interfere with lawful use of the easement in the future. At trial, Goforth denied any intent to do so. It is clear from the record harassment by the Goforths has occurred in the past. The Goforths contend this harassment occurred only because of their mistaken belief a written easement did not exist. The district court made findings as follows:

Mr. Skow also testified that the Goforths have interfered with the Skows' rights to the easement and that over the years there has been continual harassment of invitees to the Skow property. While interference may have happened in the past, Mr. Goforth acknowledged at the time of the trial that he does not intend to interfere nor does he now believe he has a right to interfere with Skows' lawful invitees and Skows' lawful use of the easement.

Based upon the assurances of the Goforths, we agree with the district court a permanent injunction on the issue of harassment was not necessary. We affirm the district court on this issue.

III. Expansion of the Easement. The Skows contend the width of the easement has been expanded by prescription or acquiescence based on the location of utilities and the northern fence. They argue the easement is now approximately twenty-four feet wide.

A prescriptive easement is "created by adverse possession, under claim of right or color of title, openly, notoriously, continuously, and hostilely asserted against the true owners for ten years or more." *Schwenker v. Sagers*, 230 N.W.2d 525, 527 (Iowa 1975). Permissive use is not adverse or under a claim of right. *Id.* An

express easement for limited use may be expanded by prescription. *Id.* Permissive use may ripen into a prescriptive easement “only where the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner’s consent or his oral agreement to the use.” *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996) (quoting *Simonsen v. Todd*, 261 Iowa 485, 489, 154 N.W.2d 730, 733 (1967)).

Boundary lines contrary to the legal description of the property may be established under Iowa Code chapter 650 if the landowner can show the boundary line has been recognized and acquiesced in for a period of ten years. Iowa Code § 650.14. The boundaries of driveway easements may be established by acquiescence. See *Thompson v. Schappert*, 229 Iowa 360, 363, 294 N.W. 580, 582 (1940). The acquiescence of predecessors in interest for the statutory period is binding upon subsequent purchasers. *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84 (1967).

Acquiescence requires proof of (1) a definitely marked dividing line (2) which is known to both adjoining landowners or their predecessors in title (3) to which both landowners have consented. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994). Both parties must be aware the asserted property line is being treated as a boundary. *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997); *Tewes*, 522 N.W.2d at 806; *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980); see *Brown v. McDaniel*, 261 Iowa 730, 735, 156 N.W.2d 349, 352 (1968) (“Acquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as the true line.”). Acquiescence is a fact-specific determination and must be proved by clear evidence by the party

seeking to establish a boundary line other than the boundary line in accordance with a survey. *See Tewes*, 522 N.W.2d at 806, 808.

The Skows were required to show the Goforths knew they were claiming the northern fence was the boundary of the easement. *See Harvey v. Platter*, 495 N.W.2d 350, 352 (Iowa App. 1992). Goforth testified he rebuilt the northern fence because the family owned horses. The Skows did not prove by clear evidence they engaged in any conduct which would have put the Goforths on notice they were claiming a wider easement area. Nor did they present evidence from predecessors in title of either property to establish the fence served as anything other than a barrier. Their claim of expansion by prescription or acquiescence must fail. We affirm the district court on this issue.

IV. Summary. The district court, in issuing the temporary injunction, observed “the dispute between the parties during the hearing on the temporary injunction appeared to center around the parties’ differing concepts of the behavior of ‘good neighbors.’” It should be apparent that this court’s decision simply restores the parties to their positions before the Goforths announced their intention to erect a fence one inch north of the southern boundary of their property. Although this result was not by design, the decision appears to effectuate justice between the parties. The Skows were able and are now able to use the easement fully as long as the fence is not erected. The Goforths will not have a further encroachment on their property. Finally, past harassment on the part of the Goforths will cease based upon their assurances to both the district court and this court. We therefore affirm the district court’s decision with regard to the harassment issue and the issue of expansion of the easement. We reverse the district court on the issue of a

permanent injunction concerning construction of a fence on the southern boundary of the Goforth property. We remand to the district court for entry of this permanent injunction.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.